LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 3 1 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 865

ROBERT R. FRANK,

Petitioner,

vs.

LAURIE W. TOMLINSON, District Director of Internal Revenue,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CUNNINGHAM & WEINSTEIN
812 Ainsley Building
Miami, Florida 33132
Attorneys for Petitioner

INDEX TO BRIEF

	Page
OPINIONS	1
JURISDICTION	1
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	8
I. There is a Conflict between the Circuits on the Basic Question of Whether the Names or Identities of an Attorney's Clients are protected by Privilege from Compulsory Disclosure at the Instance of the Internal Revenue Service	8
The Basic Principle	8
Conflict Between Circuits on the Extent of the Privilege	10
II. A Redefinition of the Attorney-Client Privilege is Required by Public Policy, and the Administration of Justice	14
CONCLUSION	16

INDEX TO APPENDIX

	Page
APPENDIX A	App. 1
Opinion of the Court of Appeals	App. 1
APPENDIX B	App. 3
§7602, Internal Revenue Code of 1954	App. 3
Code of Ethics (for the State of Florida)	App. 4
Oath of Admission for Attorneys	App. 5
Additional Ethics Governing Attorneys	App. 5
APPENDIX C	App. 6
Suggestion for Certification to the Supreme Court of Florida	App. 6

TABLE OF AUTHORITIES

Page

Cases:

Baird v. Koerner, 279 F.2d 623, 95 ALR 2d 303, (CA 9, 1960) 10, 12, 13, 14, 15

Chirac v. Reinicker, 11 Wheat. 280, 6 L.Ed. 474 (1826) 9

Colton v. United States, 306 F.2d 633 (CA 2, 1962) 11, 12

Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed. 2d 977 14

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 14

Hunt v. Blackburn, 128 U.S. 464, 9 S.Ct. 925, 32 L.Ed. 488 9

Riesman v. Caplin, 375 U.S. 440, 84 S.Ct. 508, 11 L.Ed.2d 459 ..... 7n

Tillotson v. Boughner, 350 F.2d 663 (CA 7, 1965) 10, 12, 14

Statutes and Rules:

26 U.S.C. §7602 2

28 U.S.C. §1254(1) 1

28 U.S.C. §1292(b) 7

28 U.S.C. §2101(c) 1

Code of Ethics governing attorneys in Florida 8, 9
31 Fla.Stat.An. 778
31 Fla.Stat.An. 780

Miscellaneous:

V. 24 Journal of Taxation, p. 46, January 1966 ..... 13n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

ROBERT R. FRANK,

Petitioner,

vs.

LAURIE W. TOMLINSON, District Director of Internal Revenue,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS

The Opinion of the Court of Appeals (R. 25) is reported at 351 F.2d, 384. The order of the lower court is unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 8, 1965 (Appendix p. 1, R. 25). The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1); 28 U.S.C. §2101(c).

QUESTION PRESENTED

Where an attorney-at-law has been advised that his office records showing the names and identities of his clients may be used against such clients in various proceedings at the instance of the Internal Revenue Service, are such records protected by the attorney-client privilege?

STATUTES INVOLVED

The statutes which the petitioner deems to be involved are §7602 of the Internal Revenue Code of 1954, 26 U.S.C., §7602, and portions of the Code of Ethics governing attorneys in the State of Florida, all of which are set forth in full in the Appendix to this Brief.

STATEMENT OF THE CASE

The petitioner, ROBERT R. FRANK, is a practicing attorney at law, whose personal income tax returns for certain years are supposedly under investigation by the Internal Revenue Service (R 2-3).

During the course of the investigation, the petitioner made available to the Internal Revenue agents all of his personal books and records, as well as the financial books and records of his then law partnership, Frank & Weston.

On June 19, 1964, the Internal Revenue Service caused a summons (R 5) to be served upon the petitioner, requiring him to produce for inspection and examination the following:

"The books and records for the calendar years

1959, 1960, 1961 and 1962 pertaining to the trust accounts of Frank and Weston and Robert R. Frank, including, but not limited to the following:

Copies of written instruments for the trusts.

Bank statements.

Cancelled checks.

General journals, ledgers, and cash books disclosing receipts, disbursements, payables and receivables of the trusts."

The petitioner appeared at the time and place specified in the summons, with the material requested by the summons, but refused to turn over the matter sought—on the grounds of attorney-client privilege.

The respondent initiated the within proceedings to enforce summons (R 1). To the petition, the petitioner filed an answer (R 8-10) which provided in part:

" * * * 4) Further answering, the Respondent says as follows:

a) He is a duly licensed and practicing attorney at law, engaged in the practice of law at Miami, Florida.

b) The Respondent has made available to the petitioning Internal Revenue Agent all books, records, papers and documents which would reflect his income or the income of the partnership of which he was a member during the years involved and has, in addition, tendered to the petitioning

Internal Revenue Agent all information or excerpts from the books and records of the trust account sought as would tend to reflect the income of the Respondent and his wife, and/or his law partnership for the years involved.

In addition, the Respondent has offered to turn over, in toto, the trust account sought, if the petitioning Internal Revenue Agent would assure the Respondent that such information would be kept confidential and would not be used against any third party whose name might appear in said trust account, but the petitioning Internal Revenue Agent has specifically refused to give any such assurances.

c) If the Respondent is required to turn over his trust account in toto, he would be required to violate his oath and privilege as a practicing attorney will, or may be irreparably damaged."

Attached to the petitioner's answer was a stenographic transcript of the proceedings at the time of petitioner's appearance in response to the summons (R 10, et seq.), whose correctness was admitted by the respondent (R 19). The transcript shows that appellant had already turned over all of his personal records and those of his partnership, and was then willing to turn over any additional personal records requested by the revenue agents (R 11). It further showed that the petitioner, then and there offered to turn over his trust account records, if he were assured that the information therein would be kept confidential and not used against his clients:

" * * *

WEINSTEIN [petitioner's counsel]: The records required under Summons bearing date of June 19, 1964, are produced and physically present on this table, but cannot be indescriminately turned over without violating the Attorney-Client privilege.

MORGAN: O.K., that is right.

FRANK: Do you have anything specific?

MORGAN: Do I understand you are willing to turn records over to determine income of the taxpayer?

WEINSTEIN: Upon written assurance that information contained herein would not be used against any third party who was a client of Frank & Weston or the Taxpayer; that is, any person who was a client, sought to become a client, or any of the other several increments of becoming a client.

MORGAN: Anything to do with financial transactions—We would be obligated to use that if it was based upon the income of the third party.

WEINSTEIN: Based upon that, the Taxpayer must insist that no use be made of records which may tend to violate privileges of his clients.

MORGAN: Yea, well I don't see how we could make any promise like that, but I am sure that if we came across something that should be checked

into in determining transactions of third parties, then, we would have to use the information. * * * " (R 12-13)

The petitioner also offered to make individual examinations as to any particular trust account, to determine whether or not it contained privileged information, and to turn over the Revenue agents the records of any account not privileged, but the Revenue agents refused this offer:

"FRANK: Is there anything specific you want?

MORGAN: We can use everything. Whatever records are necessary to show that it isn't your income.

WEINSTEIN: What the Taxpayer is saying is that if any particular named accounts are mentioned Taxpayer will make a determination whether they are privileged, or would violate the Canons of Ethics, and if not will here and now make such accounts available to you.

MORGAN: Any personal account that would deal with income, we are privileged to look at it.

WEINSTEIN: We are willing to make determination as to Attorney-Client privilege as to any named account you may name now. * * * " (R 14)

Upon hearing, the District Court entered its Order Enforcing Summons (R 19) which order provided, in part, as follows:

"* * * 1) The Respondent is required to produce all books, records and documents sought by that certain Internal Revenue Summons dated June 19, 1964; excluding, however, copies of any privileged communications from the Respondent's clients to the Respondent, or from the Respondent to his clients.

2) No attorney-client privilege attaches to records showing the names of the Respondent's clients, nor the books, records and documents showing property of said clients in the hands of the Respondent.

3) Pursuant to Title 28, U.S.C. §1292(b),[1] the Court finds that the rendition of this Order necessarily involves a decision of the following question:

Where he has been advised that such information will not be held confidential, may an attorney-at-law be required to make a wholesale disclosure of his trust accounts, showing the names of his clients, their trust agreements, and their property in the attorney's hands, where a summons is served in connection with an investigation of the attorney's own income taxes?

---

[1]Since *Reisman v. Caplin*, 375 U.S. 440; 84 S.Ct. 508; 11 L.Ed. 2d 459, established final appealability of this type of order, the statutory certification contained in this paragraph was not involved in any manner in the Appeal below. However, the very uncertainty expressed by the learned district judge, is a result of the conflict between Circuits, which will hereinafter be discussed; and is further demonstration of the need for this Court's guidance on the issue.

> And the Court further finds that, although said question has been answered in the affirmative by this Order, the said question involves a controlling question of law as to which there is substantial grounds for difference of opinion. * * *"

The petitioner filed timely notice of appeal to the United States Court of Appeals, and at the time he filed his brief, filed also a suggestion for certification to the Supreme Court of Florida (Appendix p. 6), which was neither mentioned, nor acted upon by the Court of Appeals in its Opinion.

REASONS FOR GRANTING THE WRIT

I. There is a conflict between the Circuits on the basic question of whether the names or identities of an attorney's clients are protected by privilege from compulsory disclosure at the instance of the Internal Revenue Service.

The Basic Principle

One of the fundamental obligations of an attorney-at-law is to preserve his clients' confidences. Indeed, the oath of admission to the bar, as recommended by the American Bar Association, and adopted in Florida, the state of the appellant's admission, required the appellant to swear that

> " * * * I will maintain the confidence and preserve inviolate the secrets of my client, * * *". (31 F.S.A. 780)

The Code of Ethics governing attorneys which, in

Florida as well as in most other states, has the force of law, provides the following:

> "37. Confidences of a client.—It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. * * * (31 F.S.A. 778).

The foregoing rules grow from a common law doctrine of privileged communication between attorney and client which has developed literally over centuries of legal history. *Chirac v. Reinicker*, 11 Wheat. 280, 6 L.Ed. 474 (1826).

The reason for rule was stated nearly a century ago by this Court in *Hunt v. Blackburn*, 128 U.S. 464; 9 S.Ct. 925; 32 L.Ed. 488.

> "The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justic, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."

Conflict Between Circuits on the Extent of the Privilege

There has existed a long standing conflict as to whether the attorney-client privilege extended to the names or identities of the clients, and the purposes for which the attorney was employed. In recent years, however, this question has risen in connection with the compulsory process available to the Internal Revenue Service during its income tax investigations, which has brought about what petitioner regards as an irreconcilable conflict between the Circuits.

In the case of *Baird v. Koerner*, 279 F.2d 623; 95 A.L.R. 2d 303 (CA 9, 1960); an attorney sent sums of money to the Treasurer of the United States in payment of undetermined tax liabilities by unnamed persons who had consulted him. The Internal Revenue Service summoned the attorney, and sought to compel him to disclose the identities of these clients, which the attorney refused. On appeal from an adjudication of contempt, the Ninth Circuit held that the attorney would not, under the circumstances of the case, be required to disclose the names of the clients who had employed him. In so deciding, the Court held that the law of California would be controlling, even though the action was grounded solely on a federal question, since the creation of the office of attorney was solely within the province of the State.

A similar situation was presented in *Tillotson v. Boughner*, 350 F.2d 663 (CA 7, 1965). There, as in *Baird*, an attorney had been forced to appeal from an adjudication of contempt for refusing to testify at the instance of the Internal Revenue Service. The attorney had transmitted a

large cashier's check to the Internal Revenue Service, but had refused to name the client or clients for whose account the check had been sent. The Seventh Circuit held that the *common law* attorney-client privilege protected against the disclosure of the identities of these clients.

The case of *Colton v. United States*, 306 F.2d 633 (CA 2, 1962), involved another case wherein an attorney was summoned by the Internal Revenue Service, and declined to answer specific questions as to whether certain persons had been his clients during certain years, and the general nature of the legal services performed for such clients. The Second Circuit held that the attorney *would* be required to answer such questions as against his claim of attorney-client privilege; and that the identity of the client or the fact that the individuals were or were not clients, did not come within the scope of the privilege.

The case at bar is one in which the attorney himself is the ostensible subject of the Internal Revenue investigation. Here, the attorney was summoned to turn over records of his trust accounts showing the names of his clients, the instruments of trust and other matters which would reveal the names of all of his clients, and (in many cases) the purposes of their consultation. As noted in the Statement of the Case, the petitioner offered to turn over the information requested upon being given assurance that it would not be used against any of the petitioner's clients. Instead of being given this assurance, the petitioner was informed that it would be used against any of petitioner's clients, if the opportunity presented itself (R 13).

The District Court ordered the petitioner to produce the records showing the names of all of his clients, even

though it was made absolutely clear to the Court that the revenue agent intended to use it against petitioner's clients, when and where they could. The Court of Appeals affirmed the action of the lower court (Appendix p. 1), relying upon and citing with approval, *Colton v. United States*, supra.

Petitioner, therefore, submits that there has developed a square conflict on this basic point between the Ninth and Seventh Circuits (in *Baird* and *Tillotson*, respectively), on the one hand, and in the Second Circuit and the Fifth Circuit (in *Colton* and *Frank*, respectively), on the other hand, as to the basic question involved in this Petition for Certiorari. While it is true that there are factual differences between certain of the cases, an analysis of the language will permit no interpretation other than the existence of a judicial dichotomy. This can easily be seen by a comparison of the following language (quoted with approval by the Fifth Circuit in the case at bar) from *Colton v. United States*, supra:

> " * * * Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client. * * * " 306 F.2d at 637.

with the following language from *Tillotson v. Boughner*, supra:

> " ' * * * [A]n attorney may not be compelled, at the instance of a hostile litigant, to disclose his retainer or the nature of the transaction to which it

> related, when such information could be made the basis of a suit against his client.'" 350 F.2d at 666.

It may likewise be seen by comparison of the order of the lower court approved by the Court of Appeals in the case at bar:

> "No attorney-client privilege attaches to records showing the names of the Respondent's clients, * * * " (Appendix p. 2)

with the following language from *Baird v. Koerner*, supra:

> * * * "If the identification of the client conveys information which ordinarily would be conceded to be part of the usual privileged communication between attorney and client, then the privilege should extend to such identification in the absence of other factors." * * * 279 F.2d at 632.

The problem caused by this obvious conflict will occur again and again as the Revenue Service steps up its investigative activities using compulsory production of third-party records.[2] Unless resolved by this Court, every attorney who receives an Internal Revenue summons may be thrust upon the horns of a cruel dilemma: If he complies with the summons, he may ultimately be subjected to liability in a suit at the instance of his client; and if he refuses, he is subject to the pains of contempt.

---

[2]The conflict has been noted by professional publications when commenting on the decision of the Court of Appeals in the case at bar. See Vol. 24, *Journal of Taxation*, p. 46, January 1966.

II. A Redefinition of the Attorney-Client Privilege Is Required by Public Policy, and the Administration of Justice.

Recent judicial trends have been characterized by a reaffirmance of the attorney's indispensable role in the administration of justice. Thus, without the effective assistance of counsel, no defendant may be convicted consistent with Fourteenth Amendment to due process, *Gideon v. Wainwright*, 372 U.S. 335; 83 S.Ct. 792; 9 L.Ed.2d 799. Nor may counsel be kept from an accused who requests his assistance during the early investigative stages of a case, *Escobedo v. Illinois*, 378 U.S. 478; 84 S.Ct. 1758; 12 L.Ed.2d 977, (1964). Petitioner suggests, however, that these enlightened advances in jurisprudence may be nullified if this Court permits a leaching away of the traditional privileges which enable counsel to be effective, i.e., ability of the client to consult, " * * * free from the consequences or the apprehension of disclosure."

It will be recalled that the revenue agent in the case at bar made no secret of his intention to use the information sought against the petitioner's clients. The revenue agent also rejected petitioner's offer to make a case by case determination, as to whether a particular name or identity would be privileged. If public policy, as in the *Baird* and *Boughner* cases, requires protection of the identity of one repentant taxpayer, then, it would seem that at least the same protection should stand as to the identity of clients as a group.

The petitioner did not contend below, and does not here contend that the name of every client is privileged; indeed, he offered to make a case by case determination,

which was refused by the lower court. Many circumstances occur to the petitioner, however, in which the essential freedom of consultation would be as much jeopardized by disclosure of identity, as it would by disclosure of words spoken. First of all, there are cases (discussed herein) of the repentant taxpayer, as well as repentant embezzlers. In other cases, the attorney may be a bankruptcy specialist (as is petitioner), and the client might be a businessman who depends upon his credit accommodations. The attorney might be a divorce specialist, whose client is more interested in saving his marriage than destroying it. The attorney might be known to defend contested paternity cases, and the client might be a politician running for office.

No protection could be offered by the attorney to any of these clients under the flat ruling of this case that:

> "No attorney-client privilege attaches to records showing the names of the Respondents's clients, * * * " (Appendix p. 2)

In *Baird v. Koerner*, supra, the Court asked:

> * * * "[O]r could the government require every tax attorney to reveal the name of those clients who had consulted the attorney with respect to possible taxes payable, so that the government could institute investigations of all such taxpayers?" 279 F.2d at 630.

Although the Court, no doubt, intended this only as a rhetorical question, to which it gave an absolute "no", we submit that the Orwellian horror implicit in this question may actually come to pass. If the ruling of the Court

of Appeals is the law of the land, then the answer is emphatically "yes"! Indeed, if the attorney has no privilege to protect the identity of his clientele generally, what is there to prevent the revenue service from summoning the members of the tax bar (including petitioner's counsel) of every community, in order to determine who has been consulting these attorneys? Investigators from the Securities and Exchange Commission (which has subpoena power) may begin summoning attorneys specializing in that field.

Every client everywhere is liable for federal income taxes. The law of taxation permeates all business life. We submit that the officers of this Court, as well as courts throughout the land are entitled to this Court's guidance in the irreconcilable conflict between the Circuits.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR B. CUNNINGHAM
PHILIP T. WEINSTEIN
Attorneys for Petitioner
812 Ainsley Building
Miami, Florida

December 31, 1965

by_____